Petition

No. 81-620

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HOPE SIBERT,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Did the adoption and application of the Civil Service Reform Act of 1978; in particular 5 U.S.C. sec. 7701 (c)(1)(B), deprive the Petitioner of the due process right to an adversary hearing before an unbiased and independent decision maker as was recognized by this Court in its decisions in Arnett v. Kennedy, 416 U.S. 134, 40 L.Ed. 2d 15 (1974) and Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed. 2d 548 (1972)?

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Case No.

IN THE UNITED STATES

SUPREME COURT

HOPE SIBERT, PETITIONER

v.

MERIT SYSTEMS PROTECTION

BOARD, et al., RESPONDENTS

PETITION FOR A WRIT OF

CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE

FOURTH CIRCUIT

The Petitioner, Hope Sibert, makes application for a Writ of Certiorari and respectfully represents:

A. The questions presented for review are:

1. Did the adoption and application of the Civil Service Reform Act of 1978; in particular 5 U.S.C. sec. 7701 (c)(1)(B), deprive the Petitioner of the due process right to an adversary hearing before an unbiased and independent decision maker as was recognized by this Court in its decisions in Arnett v Kennedy, 416 U.S. 134, 40 L.Ed. 2d 15 (1974) and Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed. 2d 548 (1972)?

B. The parties to this action in the United States Court of Appeals for the Fourth Circuit were:

1. Hope Sibert, Petitioner.

2. Merit Systems Protection Board and The Department of Health and Human Services, Respondents.

C. The following listed opinions were rendered in this matter:

1. The initial decision of the Merit Systems Protection Board dated May 20, 1980 (Unreported);

2. The final decision and order of the Merit Systems Protection Board dated November 10, 1980 (Unreported); and

3. The decision and order of the United States Court of Appeals for the Fourth Circuit in Record No. 80-1867 rendered on June 18, 1981 (Unreported).

D. The Petitioner seeks a Writ of Certiorari pursuant to 28 U.S.C. sec. 2101 (c) to review the Decision and Order of the United States Court of Appeals for the Fourth Circuit entered on June 18, 1981.

E. The case involves the following statutes:

1. 5 U.S.C. sec. 7513 (1981):

"Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to -

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written de-

cision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request. "

2. 5 U.S.C. sec. 7701 (a), (b) and (c)(1):

"Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right -

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the services, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The

Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision -

(A) in the case of any action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence."

3. 5 U.S.C. sec. 7703 (a) (1)

and (2), (b) (1) and (c):

"Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed

in the Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be -

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2)

of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court."

F.

1. Statement of the Case -

On June 29, 1979, the Petitioner, Hope Sibert, was given written notice by her branch chief, Dexter O. Rasmussen (Rasmussen) that he proposed to remove her from her position of GS-334-13, Supervisory Computer Analyst with the United States Department of Health, Education and Welfare (the agency). On December 5, 1979, the agency removed Mrs. Sibert from her non-probationary, competitive position effective December 30, 1979. The agency decision was appealed on January 17, 1980 to the Merit Systems Protection Board pursuant to the pro-

visions of 5 U.S.C. secs. 7511-13. Hearings were conducted before a hearing officer on March 14, 1980 and April 21, 1980. The hearing officer in an initial decision dated May 20, 1980 affirmed the agency decision finding that it was supported "by a preponderance of the evidence". A Petition to Review the initial decision was filed before the Merit Systems Protection Board on June 24, 1980, and on November 10, 1980, the Board denied the petition. An appeal was taken from the actions of the Merit Systems Protection Board and the agency pursuant to 5 U.S.C. sec. 7703 to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit dismissed the appeal on June 18, 1981.

2. Statement of Facts -

Near the end of July, 1978,

the Petitioner was sent to agency branches in Chicago and Birmingham. Her original travel schedule called for her and James Evans, another employee, to leave on a Sunday, spend Monday and Tuesday in Chicago, travel on Wednesday, spend Thursday and Friday in Birmingham, and return on Saturday. On the Friday in question, July 28, 1978, Rasmussen received a call from the Birmingham office informing him that Mrs. Sibert and Mr. Evans had departed Birmingham early that morning and inquiring as to the location of two security passes which they had utilized while at the facility.

Upon learning of the early departure, Rasmussen alerted his supervisor, the division director, Nelson Brenneman (Brenneman) "in case he got a call from his own

superiors in the bureau".

The following week, Mrs. Sibert prepared a request for overtime and a travel voucher indicating some work and minimal expenditures on Saturday, July 29 and forwarded these to Helen Holt, Rasmussen's secretary. According to her testimony, Mrs. Sibert intended to have Rasmussen review the papers prior to their submission to Brenneman, the only officer in the division with authority to allow payment. She wanted Rasmussen to comment upon whether or not such a submission would be an acceptable method of obtaining reimbursement for personal sums expended while in travel status which exceeded per diem allowances. She was aware of other similar reporting techniques in the agency, such as reporting overtime in

pay periods when overtime was not worked to avoid regulations regarding maximum allowances for overtime in a single pay period. She had further been advised by Rasmussen that no one in his department should lose money while in travel status.

Rasmussen was ill the entire week, and Ms. Holt forwarded the request to Brenneman. He noted the inclusion of amounts for Saturday, July 29 and held the vouchers for discussion with Rasmussen.

Upon his return to work, Rasmussen discussed the situation with Brenneman and undertook an investigation of the incident and numerous other trips taken by Mrs. Sibert. During the course of the investigation, Rasmussen and Brenneman continued to consult and discuss the case with one

another.

The investigation uncovered one other discrepancy. After a trip to Kansas City from April 12, 1978 to April 21, 1978, Mrs. Sibert submitted forms indicating that she had returned on April 23, 1978, thus entitling her to $70.25 per diem allowance, and a telephone call and eight hours of compensation time. Mrs. Sibert responded to these charges by asserting that she was in fact entitled to eight hours of compensation time for work performed on April 20, 1978. The discrepancy in dates was caused because the time was recorded when reported and not when actually worked as was the custom of the office. The per diem request for April 22 and 23 was a simple accident resulting from fatigue, illness and a confusion of

calendar dates.

Nevertheless, for reasons not apparent, Rasmussen waited until June 29, 1979, almost one year after this scenario began, to issue the proposal letter. That letter contained an "explanation of rights" which provided the Petitioner the right to make a written reply (including affidavits) and the right to make an oral reply, but did not provide the right to confront and cross-examine witnesses. Written and oral replies were given to the deciding official, Brenneman, the same individual who had played a significant role in initiating the proposal and who had conducted continuing conversations with the proposing official throughout the investigation. To no one's surprise, Brenneman adopted Rasmussen's proposal, citing as justi-

fication for his decision to remove the fact that he was the deciding official in a previous adverse action against Mrs. Sibert in 1976.

Brenneman's decision was appealed to the Merit Systems Protection Board which conducted a hearing at which the confrontation and cross-examination of witnesses was allowed, but which rendered an opinion pursuant to 5 U.S.C. sec. 7701 (c)(1)(B) as to whether or not the agency action was supported by a preponderance of the evidence. The initial decision upholding the agency action became a final order of the Merit Systems Protection Board on November 10, 1980, when it denied Appellant's petition for review. On appeal to the Fourth Circuit, Mrs. Sibert questioned the procedure utilized to effect her

removal; namely, whether or not a due process hearing was ever held in view of the facts that: confrontation of witnesses was not allowed before the agency making the decision to remove; and, on appeal to the Merit Systems Protection Board, the Board did not make an independent decision based upon the facts of record, but rather merely decided pursuant to 5 U.S.C. 7701 (c)(1)(B) whether or not the agency decision to remove was supported by evidence. She argued that while Arnett v. Kennedy, supra held that no pre-removal due process hearing was required, it also stood for the proposition that at some time, a due process hearing was necessary. The Fourth Circuit chose not to treat this issue, instead recasting the Appellant's question into one which fell squarely

under the holding in Arnett. The facts remain that the issue was properly raised and that the provisions of the Civil Service Reform Act of 1978 deny this and future petitioners due process of law.

G. Argument - THE PETITIONER HAS NOT BEEN AFFORDED HER DUE PROCESS RIGHT TO AN ADVERSARY HEARING BEFORE AN UNBIASED AND INDEPENDENT DECISION MAKER.

The agency viewed this case as one in which it intended to prove an actual intent on the part of the Petitioner to defraud. In the proceeding before the Merit Systems Protection Board, the following colloquy between the presiding official and the agency representative is recorded:

"PRESIDING OFFICIAL SCHWARTZ: I must presume from that, even though you are not saying it, that for personal

gain would be to defraud the government, right?

MR. DUNHAM: That's correct.

...

PRESIDING OFFICIAL SCHWARTZ: But you do include the issue of intent, is that not correct?

MR. DUNHAM: That is correct."

While the Petitioner admitted to some sloppiness in record keeping, she adamantly denied fraudulent intent and supported her position with reasonable and believable explanations. These explanations fell upon deaf ears, very likely because the Petitioner, throughout the course of the adverse action proceedings, was consistently denied the basic elements of a due process hearing and the corresponding opportunity to clear her name.

Considering the nature of the charges brought against the Petitioner, we must view the prior proceeding within the context of the following

remarks of this Court in Board of Regents v. Roth, 408 U.S. 564 at 573, 33 L.Ed.2d 548 (1972):

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (citations omitted)

Subsequent to Roth, a severly divided Court in Arnett v. Kennedy, 416 U.S. 134, 40 L. Ed.2d. 15 (1974) held that the provisions of the Lloyd - La Follette Act, 5 U.S.C. sec. 7501 (1974), in conjunction with Civil Service Commission and Office of

Economic Opportunity Regulations afforded a severed non-probationary federal employee sufficient procedural ddue process rights. It is significant to note, however, that the decision in Arnett is heavily reliant upon the provision of an adequate post-removal hearing and that the law and accompanying regulations have been substantially altered since, and perhaps because of, Arnett.

It is respectfully submitted that an examination of the proceedings in the instant case will demonstrate clearly that the Petitioner has never been afforded the due process rights which were affirmed in Roth and Arnett.

1. The Agency Proceeding - The procedure for the hearing conducted before the agency was mandated in the

proposal letter. This proceeding failed to provide the elemental requirements of due process in that the Petitioner was not provided the right to confront witnesses against her, cross-examine such witnesses or offer (except by way of affidavit) witnesses in her defense. First and foremost the agency proceeding failed to satisfy the longstanding requirements described in Londoner v. Denver, 210 U.S. 373, 386 (1908), and interpreted in 2 Davis, Administrative Law Treatise, sec. 12.1, p. 4067 (1979 ed) as follows:

> "A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal. The word "proof" includes not only opportunity to rebut or explain in response to the opponent's evidence. ...What the Court said in the Londoner opinion has long been fundamental, and it still is. Because the Londoner

> formulation is so generally understood, later opinions have usually assumed that requirement of "hearing" includes "if need be" taking evidence subject to cross-examination."

As to the right of confrontation and cross-examination, see also Goldberg v. Kelly, 397 U.S. 254, 268, 25 L.Ed.2d 287 (1970).

Secondly, the agency proceeding failed to satisfy due process requirements because of the lack of an impartial decision-maker. As noted in the Statement of Facts, the decision-maker, Brenneman, initiated the inquiry into the Appellants's actions and remained in continuing contact with the proposing official throughout the course of the investigation. Such conduct deprived the Appellant due process rights for at least two reasons.

First, the Appellant has the

right to have a decision made by an individual not affected by ex parte communications. The general principle regarding such communications was stated in Doe v. Hampton, 566 F.2d. 265 (D.C. Cir., 1977) as follows:

> "...ex parte communications by an adversary party to a decision-maker in an adjudicatory proceeding are prohibited as fundamentally at variance with our conceptions of due process. See Sangamon Valley Television Corp. v. United States, 106 U.S. App. D.C. 30, 269 F.2d. 221 (1959); Administrative Procedure Act sec. 5(c), 5 U.S.C. sec. 554(d)(1970)."

Secondly, the applicable regulations themselves provide for a separation of functions between the proposing and deciding officials which was not adhered to in the instant situation. In this regard, it is interesting to note that three Justices in Arnett, supra, would have held that

a removal proposal and the decision to remove could be made by the same agency official. Arnett, 416 U.S. at 155, footnote 21. Subsequent to the ruling in Arnett, however, 5 C.F.R. sec. 752.202(f), Civil Service Regulations (1976) were amended to provide the following quoted additional safeguard in adverse action proceedings:

> "...The decision shall be made by a higher Civil official of the agency, where there is one, than the official who proposed the adverse action."

This regulation, clearly creating a two-step procedure, was in effect during the investigational stage of the agency proceeding and continued until Interim Regulations of the Office of Personnel Management were adopted (effective January 11, 1979), Federal Register, Vol. 44, No. 11 - Tuesday, January 16, 1979. The Merit Systems

Protection Board sidestepped the issue of ex parte communications by acknowledging that such were prohibited under the regulations in effect in 1978, but asserted that the new regulations no longer mandate a two-stage procedure. The Fourth Circuit merely ignored the entire point.

In short, in terms of a due process hearing, the agency proceeding was severely flawed. Prior to the passage of the Civil Service Reform Act of 1978, such flaws were typically corrected by the fact that previous law (5 U.S.C. sec. 7701 [1978]) afforded a de novo hearing before the Civil Service Commission. See McTierman v. Gronouski, 337 F.2d 31 (2nd Cir. 1964). As will now be demonstrated, such was not the case for the Petitioner.

2. The Appeal Proceeding -

Unlike its predecessor, the Civil Serivce Reform Act in 5 U.S.C. sec. 7701 (c)(1)(B) (1980) mandates that the Merit Systems Protection Board consider and decide removal appeals on the basis of whether or not the agency action was supported by a preponderance of the evidence. Unfortunately for the Petitioner, the hearing officer abided by these rules. The net effect to the Petitioner is that the deck which was stacked by the agency was reviewed by the Merit Systems Protection Board to see if it was sufficiently stacked. It is beyond cavil that the Petitioner was entitled to more than this; that she was entitled at some point along the line to have a decision made by an impartial decision-maker on the basis of the testimony of witnesses appearing before him who have been subject to

cross-examination. Such is the essence of a hearing. See cases supra, and Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177, 83 L.Ed. 111 (1938).

The appeal proceeding clearly failed to provide such to the Appellant since the decision-maker failed to make his own decisions on the evidence as to innocence or guilt, but merely viewed such evidence to see if the agency's decision with regard to these crucial issues was supportable. In a real sense, the prosecutor, without the benefit of cross-examination and confrontation, decided both to prosecute and to find guilty. The appeal was limited to whether or not the prosecutor was clearly erroneous. The flaws of the agency proceeding were thus carried forward and repeated at the Merit Systems

Protection Board level and simply allowed to exist by the Fourth Circuit.

H. Conclusion - The Petitioner respectfully maintains that the United States Court of Appeals determined this matter in a manner which is in severe conflict with applicable decisions of this Court; that the issues presented important questions of federal law affecting possibly thousands of federal employees and that the issues were unjustifiably ignored. The issues will reappear. This Petitioner asks merely that they be treated in her case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 1981, a copy of the aforegoing Petition for Writ of Certiorari was mailed to The Office of the Solicitor General of the United States, Room 5614, Department of Justice, Washington, D.C. 20530, Timothy M. White, Esquire, Department of Health and Human Services, Room 5362, 330 Independence Avenue, S.W., Washington, D.C. 20201 and Paul R. Kramer, Esquire, Deputy States Attorney, Eighth Floor - U.S. Court House, 101 W. Lombard Street, Baltimore, MD 21201.

William T. Glasgow

APPENDIX

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 80-1867

HOPE SIBERT,

Petitioner,

versus

MERIT SYSTEMS PROTECTION BOARD,

and

The Department of Health, Education and Welfare,

Respondents.

Appeal from the Merit Systems Protection Board.

Argued: May 5, 1981

Decided: June 18, 1981

Before FIELD, Senior Circuit Judge; and SPROUSE and ERVIN, Circuit Judges.

Terry B. Blair and William T. Glasgow (Glasgow and Sturm, P.A. on brief) for Petitioner; Timothy M. White, U. S. Department of Health and Human Services (Russell T. Baker, United States Attorney, Paul R. Kramer, Deputy United States Attorney on brief) for Respondents.

PER CURIAM:

The petitioner, Hope Sibert, was given a written notice on June 29, 1979, that her supervisor proposed that she be removed from her position as a Supervisory Computer Analyst with the Social Security Administration. By letter dated December 5, 1979, petitioner was notified that a decision

had been reached to remove her from her position effective December 30, 1979. Sibert sought review of that decision by the Merit Systems Protection Board pursuant to 5 U.S.C. Section 7513(d) and 5 U.S.C. Section 7701. A hearing was conducted pursuant to this latter statutory section, and the initial decision of the Board was issued May 20, 1980, affirming the removal action. Sibert filed a petition for review of this decision which petition was denied by the Board by order of November 10, 1980. The present petition for review of this final decision of the Board was filed in this court pursuant to 5 U.S.C. Section 7703.

The proposal to remove Sibert was based upon her false claims for overtime compensation while in travel

status on two occasions and the submission of false travel vouchers. The proposal to remove letter noted that Sibert had been suspended from duty for a similar offense two years earlier, and the letter further advised her of all of the procedural rights to which she was entitled under 5 U.S.C. Section 7513. In her response to the charges, Sibert did not deny the charges but offered an explanation and excuse for the false submissions. In his letter informing petitioner of his decision, the deciding official rejected Sibert's explanations and found no mitigating circumstances.

The scope of our review under 5 U.S.C. Section 7703(c) is limited to an examination of the record to determine whether the agency action, findings or conclusions are:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedure required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence.

As a threshold matter, petitioner contends that the discharge procedure violated her rights to due process, claiming that she should have received an evidentiary hearing prior to her removal. The ready answer to this argument is found in Arnett v. Kennedy, 416 U.S. 134 (1974), in which the Court held that due process does not require a trial type hearing prior to dismissal of a competitive service employee.

With respect to the substantive issues presented by the petition, the

the record discloses that the Board's decision was supported by substantial evidence, and we discern nothing which would indicate that it acted in an arbitrary or capricious manner. Since we find that Sibert's removal was for "such cause as will promote the efficiency of the service", 5 U.S.C. Section 7513(a), the petition for review is denied.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HOPE SIBERT	)	
	)	
v.	)	
	)	
DEPARTMENT OF	)	MSAP Docket
	)	
HEATLH, EDUCATION	)	No. PH075209148
	)	
AND WELFARE	)	

OPINION AND ORDER

On January 21, 1980, Hope Sibert appealed the action of the Social Security Administration removing her from the position of Computer Analyst, effective December 30, 1979. In an initial decision dated May 20, 1980, the Board's presiding official sustained the agency charges that appellant submitted false claims for compensation and expenses while in travel status.

In her petition for review, appellant contends that agency officials

engaged in several procedural irregularities in accomplishing her removal. She asserts that the alleged procedural errors warrant reversal of the agency's action.

Appellant first asserts that communications between Dexter Rasmussen the proposing official, and Nelson Brenneman, the deciding official, violated her due process rights.1/ Prior to the passage of the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978), Civil Service Commission regulations required that the final decision concerning an adverse action be made by a higher ranking official than the proposing official. 5 C.F.R. 752.202 (f) (1978).2/ However, the regulations implementing the Reform Act contain no such requirement. See 5 C.F.R. Part 752 (1980).

Inasmuch as the proposal and final decision may now be issued by the same person, we discern no violation of appellant's procedural rights resulting from communications between the proposing and deciding officials in a case where the agency has adopted a two-stage decision making process not required by statute or regulation.

The appellant also argues that there were improper ex parte communications between Allen Dunham, the agency representative at appellant's hearing, and David Bowers, an employee who traveled with appellant on one of the trips for which she submitted false documents. However, even assuming that this conversation constitutes procedural error, appellant has not sought to demonstrate that the error was harmful. 5 C.F.R. 1201.56(b). Indeed, at the time of

communication in question, Mr. Dunham had not been designated the agency representative (Agency response to petition for review at 4), and Bowers first contacted Dunham. Dunham advised Bowers that he was obligated to cooperate in the investigation concerning the vouchers and travel documents submitted for his trip with appellant. Accordingly, we find no prejudice to appellant as a result of this conversation.

Appellant next contends that Brenneman should have disqualified himself as the deciding official in the removal action because he had been the deciding official in an earlier action suspending appellant. She argues that Brenneman was impartial. The Presiding official thoroughly considered this argument in the intitial decision and

concluded that appellant had not sustained here burden of proving harmful error under 5 C.F.R. 1201.56. Appellant has raised no additional arguments herein and we conclude the presiding official did not err in making his finding.

Finally, appellant argues that she was not given notice of all the material considered by the agency in reaching the decision to remove her. 5 U.S.C. 7513 and 5 C.F.R. 752.401(b). She specifically points to a document contained in an Office of Investigation report dated April 18, 1979. The document shows that the Department of Justice declined to initiate criminal prosecution of appellant concerning the vouchers in question. (H.T. at 79-83) The agency denies it considered this document, and by its very nature it is

not the type of information on which the agency would base its decision to remove appellant. Appellant also alleged that files relating to one James Evans were improperly excluded from her evidence file. This file contains the record of an interview occurring August 11, 1978, between Dexter Rasmussen and Mr. Evans. Evans had accompanied appellant on one of the trips for which false documents were submitted. A statement from that interview was used to impeach Evans' testimony when he was called as a witness by appellant at the hearing. (H.T. at 216) While it is clear that Evans' prior statement was contrary to appellant's claims that she had not intentionally falsified the documents, the agency asserts that it was only used to impeach to witness,

and was not relied on in the decision to remove her.

Appellant has introduced no evidence which indicates that the agency relied on this information which was not in the file. Moreover, the evidence which is contained in the file is sufficient to uphold the adverse action. Therefore, we find no harmful error in the fact that the record of the interview with Evans was not contained in appellant's file.

Since appellant has not shown any misinterpretation of law, rule, or regulation, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201. 113(b).

Appellant is hereby notified of

the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby advised of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

November 10, 1980 — Robert E. Taylor

Date — Robert E. Taylor

Secretary

Washington, D.C.

FOOTNOTES

1/ Appellant first raised the argument concerning these ex parte communications in her petition for review. However, appellant apparently first learned of the communications at the hearings. (Hearing transcript, H.T., at 124).

2/ Under these regulations ex parte communications between the deciding official and other agency officials involved in the adverse action were prohibited. Ryden v. United States, 585 F.2d 482 (Ct. Cl. 1978). But see also, Henkle v. Campbell, 462 F. Supp. 1286 (D. Kan. 1978).

UNITED STATES OF AMERICA

BEFORE THE

MERIT SYSTEMS PROTECTION BOARD

PHILADELPHIA FIELD OFFICE

HOPE SIBERT

v.

DEPARTMENT OF HEALTH,

EDUCATION AND WELFARE

INITIAL DECISION NUMBER:

PH075209148

DATE: May 20, 1980

INTRODUCTION

This is an appeal from a removal action. Hope Sibert, the appellant, was removed from the position of Computer Systems Analyst, by the Department of Health, Education and Welfare, Social Security Administration, Baltimore, Maryland. By this appeal, the appellant seeks to have the agency's decision over-

turned, and to be retroactively restored to her former position. The appellant requested a hearing which was held on March 14, 1980 and April 21, 1980.

JURISDICTION

An employee may submit an appeal from any action, which is appealable to the Baord under any law, rule or regulation. 5 U.S.C. Section 7701(a). The law provides that an employee in the competitive service, who is not serving a probationary period, may appeal an action removing her from the Federal service. 5 U.S.C. Sections 7511(1)(A), 7512(1) and 7513(d). The record shows that appellant was an employee in the competitive service, that she was not serving in a probationary period, and that she was removed from her position with the Social Security Administration. Accordingly, I find

that this appeal is acceptable for adjudication.

ANALYSIS AND FINDINGS

5 U.S.C. Section 7701(c)(1)(B) provides that in cases such as the instant case any agency decision may not be sustained unless that decision is supported by a preponderance of the evidence. In this context a preponderance of the evidence means, "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R. Section 1201.56(c)(2).

The appellant was removed from her position because of agency charges that she (a) submitted a "Request for Overtime While in Travel Status," form dated April 24, 1978, worksheet used

in preparing her travel voucher, and a travel voucher (Standard Form 1012) dated May 2, 1978, which contained false information regarding her return from Kansas City, Mo., on April 21, 1978; and (b) submitted a "Request for Overtime While in Travel Status", form dated August 1, 1978, a worksheet used in preparing her travel voucher, dated August 3, 1978, and a travel voucher dated August 3, 1978, which contained false information regarding her return from Birmingham, Alabama, on July 28, 1978. In addition, the agency considered the appellant's past disciplinary record, consisting of a 30 day suspension in July 26, 1976, as part of the reason for the current action.

In support of the agency action, the appellate file contains appellant's

Travel Order and Travel Vouchers for the periods in question and 2 "Requests for Overtime While in Travel Status" forms, signed by appellant and showing a claim for 7 hours compensatory time on July 29, 1978, and 8 hours overtime on April 22, 1978. The file also contains Time and Attendance Rosters for April 9, 1978 and May 6, 1978, and memoranda for the record recording conversations between appellant; the proposing official, Dexter Rasmussen; Dave Bowers, an agency employee who accompanied appellant on one of the trips in question and Mr. Rasmussen. The appellant has at all times admitted that her travel documents for the periods in question contained inaccurate information. She admits that her travel worksheet and corresponding travel voucher dated May 2, 1978, included

a request for miscellaneous expenses and per diem for April 21, April 22, and April 23, 1978, when in fact records indicate that she departed Kansas City, Mo., at 8:00 p.m. on April 20, 1978 and arrived home at approximately 2:00 a.m. on April 21, 1978. Appellant further admits that she did submit a "Request for Overtime While in Travel Status" form which requested 8 hours compensatory time on April 22, 1978. Additionally, appellant admits to submitting a travel worksheet and corresponding travel voucher dated August 3, 1978 which included miscellaneous expenses and per diem for July 28 and July 29, 1978, when she actually performed this travel on July 28, 1979. She also admits to submitting a "Request for Overtime While in Travel Status" form re-

questing 7 hours overtime on July 29, 1978.

With respect to charge (a) relating to the Kansas City trip, the appellant makes several contentions which she believes indicates that the agency has not proven its charge by a preponderance of evidence. She states that although she submitted a Request for Overtime While in Travel Status form, she specifically crossed off the work "overtime" and put in the word "comp" time, meaning compensatory time. She contends that she was; however, entitled to either "comp" time or overtime for the week of that trip. The travel worksheet, she states, was prepared in a few minutes time and she mixed up the dates on the worksheet by inadvertently looking at the month of June on her calendar instead of the month of April

1978. This error was compounded on her travel voucher. She had intended to use sick leave on Friday, April 21, 1978, and had requested that her husband call this in to the agency. He neglected to do so, and she subsequently did not sign for sick leave. Lastly, she stated that when she submitted her travel voucher, she submitted the original airline ticket which showed her originally planned return date, not her early return date. However, she states that she did not have the corrected ticket showing her actual early return date because Mr. Bowers, the employee who accompanied her on the trip, had it. She insists that the incorrect information on her travel documents was put there as a result of an honest mistake.

After reviewing evidence of record

I find that the appellant's submission of false information on her travel documents for the Kansas City trip in April 1978, was not the result of simple error as she contends. The appellant returned from Kansas City at approximately 2:00 a.m. on Friday, April 21, 1978. She submitted her travel documents on Monday, April 24, 1978, her first day back to work following the trip. The documents she submitted do not appear to be haphazardly completed, but are in fact quite detailed. It does not seem likely to me that the appellant would not remember on Monday, that she returned on Friday. Additionally, if it was true that the appellant requested her husband to call her agency to report her on sick leave, I fail to understand how she could have simply

forgotten that she never signed for sick leave upon her return. Nonetheless, even it this was the case, it seems likely to me that the fact of being on sick leave on Friday would have jarred her memory on Monday, when she completed her travel documents. Additionally, I find it implausible that the appellant would not have noticed the incorrect return date on her travel voucher when she signed it. Of course, the appellant testified that she did not notice which travel voucher she signed and that she frequently had several outstanding. However, the testimony of agency witness, Ms. Helen Holt, Mr. Rasmussen's secretary, was that appellant generally reviewed her travel vouchers before she submitted them for approval, and that on occasions appellant found

typographical errors or other errors that she would bring to Ms. Holt's attention (H.T. p. 29). It therefore seems inconsistent that on this one occasion the appellant would have summarily signed her travel voucher without reviewing.

In summary, the appellant has made no contention of allegations which establishes that the agency did not meet its burden of proof with respect to charge (a). The agency file includes the travel documents submitted. They are coupled with the appellant's own admission that the dates on the forms were incorrect. The appellant's explanation in no way serves to mitigate the charge. Therefore, charge (a) is sustained by the preponderance of the evidence.

The appellant next contends that the agency did not meet its burden of proof

as to the second charge relating to the Birmingham, Alabama, trip. The appellant admits that she did submit requests for overtime and expenses for a date when she did not actually work, but stated that this was done only to recoup expenses over and above the per diem that she was allowed on the trip. She further stated that she believed that this method of recouping her expenses was the policy, and she believed it was an accepted department procedure to claim overtime in this manner. Appellant further introduced testimony of several witnesses who stated that Mr. Rasmussen has told them that, "Nobody loses money on trips in my department. They claim extra overtime." Appellant also stated that she put the voucher for this trip on Mr. Rasmussen's desk with a note that it was only for review and that

she wanted to talk to him about it. She states that when she signed the voucher she did not realize which voucher she was signing.

After reviewing the appellant's contentions, I find them implausible. The appellant produced no evidence or witnesses which proved that she, in fact, put a note of her voucher to the effect that it was for review to see if she could recoup monies lost while in travel status. The agency, on the other hand produced three witnesses, who testified that there was no such note on the forms when they saw them. The appellant's claim that it was common practice in the office to claim overtime is likewise unsubstantiated. The agency produced two witnesses who testified that such was not the policy. The appellant

produced several witnesses who stated that they heard Mr Rasmussen say essentially that no one in his department lost money in travel, but she produced no witnesses who could state that they had ever used this method in their travel documents, nor anyone who received money for overtime not worked. Additionally, while the appellant stated she incurred expenses in excess of the maximum allowed, she produced no evidence to support this claim. Accordingly, in view of the agency evidence and the appellant's own submission I find that charge (b) is sustained by a preponderance of the evidence.

Appellant, in her appeal petition, alleged discrimination. Although she never qualified that to mean prohibited discrimination, she stated that

Mr. James Evans who submitted a travel voucher containing false information received a written reprimand while, she was removed. Although given the opportunity at the hearing and in the post hearing brief, the appellant never sufficiently elaborated on the allegation to any extent. I have therefore reviewed this contention to mean either prohibited discrimination or an argument relating to like penalties for like offenses. I will discuss the discrimination issue first.

I have examined the case under the controlling legal standards applicable to claims of discrimination. In this regard the order and allocation of proof in an individual claim based on disparate treatment are set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The McDonnell

Douglas standards apply to individual claims of employment discrimination in the federal sector. Whiteside v. Gill, 580 F.2d 906 (5th Cir. 1978); Abrams v. Johnson, 534 F.2d 1226 (6th Cir. 1976).

Under McDonnell Douglas, the complainant carries the initial burden of establishing a prima facie case of discrimination which shows that the actions taken by the employer were taken for discriminatory reasons prohibited under the Civil Rights Act. Furnco Construction Corp. v. Waters 98 S. Ct. 2943 (1978). If the appellant makes a prima facie case the burden shifts to the employer to articulate some legitimate non-discriminatory reason for the challenged action. If the employer does this the burden shifts back to the appellant to show that the employer's reasons were

pretext to cover up discrimination.
In the instant case the appellant has not established a prima facie case of discrimination of any sort. The agency, on the other hand has shown, through its sustained charges, that the appellant did submit false travel vouchers with false supporting documents. The appellant has not shown that the agency's reasons were pretext to discrimination. I therefore find that there was no discrimination in this case.
The second contention is one of like penalties for like offenses. The appellant contends that James Evans submitted a voucher showing seven hours overtime that he did not work. When it was discovered by Mr. Rasmussen, Mr. Evans received a reprimand. The appellant believes that since the incidences were similar, and related

to the Birmangham, Alabama trip, the punishment should have been similar. After review I do not agree with the appellant's contentions. The appellant had a past record, a 30 day suspension for 2 similar offenses. Additionally the appellant was charged with two current instances of submitting falsified travel vouchers. On the trip that the appellant was on with Mr. Evans, the appellant was the team leader. I believe the seriousness of the appellant's case so dissimilar to Mr. Evans that the concept of like penalties for like offenses is not applicable to this case. Additionally, the appellant offered the testimony of Ms. Schwarzman and Mr. Bowers, two agency employees who admitted to having several errors on their travel vouchers. In both cases the witnesses testified that they were advised of

their errors and allowed to correct them. The appellant never expounded on what types of errors they made on their vouchers; that is whether or not the errors involved simple mathematical errors or the submission of false statements. Therefore, there is no basis upon which a determination of like penalties for like offenses can be made in their cases.

Appellant next contends that the proposal letter and decision letter were not submitted within a reasonable time after the appellant submitted the travel documents. The appellant notes that the trips were taken in April and August of 1978. The appellant was interviewed by Mr. Rasmussen about the April trip on September 27, 1978. The Department of Investigation became involved in the case and concluded their interest in

March 1979. However the letter to propose removal was not prepared until June 29, 1979, and although the appellant responded on September 28, 1979, the decision to remove was made on December 5, 1979, and was effective December 30, 1979. The appellant insists that the delay of 9 months between the date the appellant was interviewed (September 27, 1978) and the date the advance notice was given was unreasonable.

I do not agree that the advance notice was untimely. For, during this period, agency officials had to determine the proper penalty to propose, gather documents on which the action would be based and then prepare an advance notice of charges. Heffron v. United States, 405 Fed 2d 1307 (Ct. Cl. 1969) stands for the proposition that a charge to be stale there must be a showing that

there was a delay in bringing charges and that this was prejudicial to the appellant. The court ruled in that case that a nine month delay in bringing the charge was not prejudicial to the appellant. I note in this case that the appellant has failed to present any evidence to establish that she was prejudiced as a result of the delay in bringing the charges. I therefore find that the agency's delay in bringing the charges against appellant was reasonable and in no way impeded the appellant's ability to defend the charge.

With respect to the removal notice I note that the decision notice was given about sixty seven days after the appellant submitted her written response. The appellant asserts that this was an unreasonable delay. In this regard

the law specifies that the appellant should receive a written decision at the "earliest practicable date." 5 U.S.C. Section 7513(b)(4). The agency insisted that the length of time taken to make the decision was, taken to ensure that none of the appellant's rights were violated, and because of the severity of the penalty required a great deal of consideration. (Adverse Action File, Tab 7). By necessity, no rigid guidelines can be constructed to determine exactly what the "earliest practicable date" is, since the time involved would vary depending on the complexity of the charges and the severity of the disciplined proposed. In the instant case, I find that there was no unreasonable delay because the appellant's case was rather complex. In making the

decision, the deciding official, Mr. Nelson Brenneman stated in his testimony that he considered the information in the evidence file, the appellant's written response, the appellant's past disciplinary record and the appellant's record of performance with the agency. It seems reasonable to me that this sort of review might have taken approximately two months to do. I therefore find that the removal was issued at the earliest practicable date. In making this finding I have considered that the appellant has at no time alleged that she was unduly prejudiced by the amount of time that it took the agency to issue the decision.

The appellant next contends that the deciding official, Nelson Brenneman, was prejudiced by his knowledge of

the appellant's past disciplinary record. She stressed the fact that Mr. Brenneman was the deciding official in the appellant's 30 day suspension, effected in 1976, and asserts that he therefore, should have disqualified himself as the deciding official in present removal action. I do not agree with the appellant on several grounds. Generally when an employee has been subjected to disciplinary action for a past offense, the agency can use this disciplinary record as part of the basis for the current adverse action against her, provided the past disciplinary action meets three criteria: First, the employee was informed of the action in writing; second, the employee was given an opportunity to dispute the action by having it reviewed, on its merits, by

an authority different from the one that took the action; and third, the action was made a matter of record. Henkle v. Campbell 462 F. Supp. 1228 (1978). The above criteria was met in the present case and the evidence of reocrd substantiates this. Additionally, there is no indication that the appellant was deprived of her entitlement to have that suspension reviewed on appeal. That she chose not to have the suspension reviewed on the merits is of no concern in this appeal, and although the appellant stated some merit reasons to support the fact that the suspension was not warranted, those reasons cannot be considered in this appeal. The prior disciplinary record is considered only with regard to the severity of the discipline in the present appeal.

As to the appellant's contention that

Mr. Brenneman should have disqualified himself as the deciding official in the removal action because he was the deciding official in the suspension action, I note several things. The appellant insists that Mr. Brenneman was strongly convinced that appellant had intentionally falsified her travel records because he, Brenneman, was not familiar with the overtime posting procedures. However, the appellant never sufficiently elaborated on this contention to allow for refutation. As to Brenneman's authority to sign the removal notice, I note that at the time the notice was given Mr. Brenneman was appellant's supervisor and therefore authorized to institute disciplinary action. Finally, I note that the appellant has not established that she was unduly prejudiced by Mr. Brenneman acting as

deciding official.

In this regard I note that the appellant appeared to be making an allegation of procedural error with respect to Mr. Brenneman acting as deciding official. Such an allegation is an affirmative defense but the burden of proof rests with the appellant. See 5 U.S.C. Section 7701(c)(2)(A), and 5 CFR Section 1201.56 (b)(1). The appellant must show that the agency committed procedural error and that the error was harmful. See William E. Parker v. Defense Logistics Agency, MSPB Order 80-47, February 19, 1980.

The Board held in Parker that, with regard to harmful error, "...the question is whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before this agency. Further, 5 CFR

Section 1201.56(c)(3) defines harmful error as,"Error by the agency in the application of its procedures which, in the absence of the cure of the error, might have caused the agency to reach a conclusion different then the one reached..." The appellant has made no arguments or offers of proof which show that any harmful error was made in her case. I therefore find that the appellant has not met her burden of proof, and that no harmful error occurred.

In summary I find that the agency has proven the reasons for the removal by a preonderance of the evidence and the charges are sustained. The appellant has not established in the removal action harmful procedural error, a prohibited personnel practice, or that the agency decision was contrary

to law. Therefore, the agency action is affirmed.

DECISION

The agency action is affirmed.